

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

OCT 14 2009

Federal Communications Commission
Office of the Secretary

In the Matter of)	EB Docket No. 07-147
)	
PENDLETON C. WAUGH, CHARLES M.)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	NAL/Acct. No. 200732080025
)	
PREFERRED COMMUNICATION)	FRN No. 0003769049
SYSTEMS, INC.)	
)	
Licensee of Various Site-by-Site Licenses in)	
the Specialized Mobile Radio Service.)	
)	
PREFERRED ACQUISITIONS, INC.)	FRN No. 0003786183
)	
Licensee of Various Economic Area Licenses)	
in the 800 MHz Specialized Mobile Radio)	
Service)	

To: The Commission

ENFORCEMENT BUREAU'S OPPOSITION TO MICHAEL D. JUDY'S APPEAL

1. On October 1, 2009, several individuals including Michael D. Judy ("Judy *et al.*")¹ filed an Appeal of the Presiding Judge's September 25, 2009, Order in this case ("Sept. 25 Order"), which reinstituted a settlement agreement among some of the parties and found Judy *et al.*'s then-pending request to intervene to be moot.² The Enforcement Bureau ("Bureau"), pursuant to 47 C.F.R. § 1.301(c)(7), respectfully requests that the Commission deny or dismiss Judy *et al.*'s appeal. These individuals should not be permitted to intervene in this case. First, Judy *et al.* filed their initial request to intervene nearly two years late, and they have offered no justification for their untimeliness. Moreover, they have failed to show as a substantive matter that intervention should be permitted. Specifically, they have failed to demonstrate a substantial

¹ Judy comprises 28 purported shareholders of one of the above-captioned licensees, Preferred Communication Systems, Inc., ("PCSI") who assert that they hold "at least 16,666" shares of stock. See Motion for Limited Intervention at Exhibit 1 at 2, filed July 17, 2009 ("Initial Motion"). The other above-captioned licensee, Preferred Acquisitions, Inc., is PCSI's wholly-owned subsidiary.

² Order, FCC 09M-57 (ALJ, rel. Sept. 25, 2009).

interest in the proceeding, or explain how their participation will assist the Commission in determining the issues in question.³

2. Judy *et al.* first attempted to intervene in this case on July 17, 2009, when they filed a Motion for Limited Intervention (“Initial Motion”) requesting party status for the “limited” purpose of staying the settlement negotiations that were then underway in the hearing, in order to await the outcome of certain state court litigation.⁴ The Bureau opposed that motion.⁵ In his August 6, 2009, Order, FCC 09M-51, (“August 6 Ruling”), the Presiding Judge approved a Settlement Agreement, terminated the proceeding, and found Judy *et al.*’s Initial Motion to be moot. On August 20, 2009, the Presiding Judge stayed the August 6 Ruling by Order, FCC 09M-53. Judy *et al.* then filed a Renewed Motion for Limited Intervention (“Renewed Motion”) on September 8, and filed supplements to both the Initial Motion and the Renewed Motion on September 11 and 14, respectively. On September 25, 2009, the Presiding Judge issued an Order reinstating the Ruling and adjudged the Renewed Motion to be moot. Judy *et al.* seeks to appeal the Sept. 25 Order.

3. Judy *et al.*’s Appeal should be denied or dismissed because these individuals have not complied with the Commission’s rules governing requests to intervene. Section 1.223(b) of the Commission’s rules⁶ states clearly that any petitions to intervene must be filed not later than 30 days after Federal Register publication of the hearing designation order or a summary of that order. Judy *et al.* did not seek to intervene until nearly *two years* after that deadline.⁷ Any

³ See 47 C.F.R. § 1.223(c).

⁴ Judy filed the lawsuit, which purportedly underpins his Initial Motion and Renewed Motion, discussed *infra*, in the Court of Chancery of the State of Delaware, on July 8, 2009, to compel Mr. Austin to conduct an annual meeting for the first time since 1998 and to appoint additional directors to the PCSI’s Board of Directors.

⁵ Various other pleadings were also filed opposing and supporting the request. See Opposition to Motion for Limited Intervention, filed by Preferred Communication Systems, Inc., Preferred Acquisitions, Inc., and Charles M. Austin, on July 27, 2009; Comments in Support of Motion for Limited Intervention, filed by Pendleton C. Waugh, on July 28, 2009.

⁶ See 47 C.F.R. § 1.223(b).

⁷ See 72 Fed. Reg. 42088 (2007), correction published at 72 Fed. Reg. 45049 (2007).

person seeking to intervene after the deadline must “set forth the interest of the petitioner in the proceeding, show how such petitioner’s participation will assist the Commission in the determination of the issues in question . . . [and] set forth reasons why it was not possible to file a petition within the time prescribed.”⁸ *Judy et al.*, however, offer no justification at all for their failure to seek to intervene in a timely manner. *Judy et al.* commenced their state lawsuit almost simultaneously with their attempt to intervene, but this does not in itself justify their delay, nor do they demonstrate that it justified the lateness of their Initial Motion. The Commission should deny *Judy et al.*’s request as it has done in similar cases.⁹

4. *Judy et al.*’s attempts to intervene are also procedurally deficient because they do not provide an affidavit demonstrating personal knowledge of the relevant facts, as required by 47 C.F.R. § 1.223(c).¹⁰ Although *Judy et al.* submitted an affidavit with their Initial Motion, that document failed to demonstrate any personal knowledge about the then-ongoing settlement negotiations.¹¹ In addition, *Judy et al.* failed to provide *any* affidavit with their Renewed Motion newly alleging defects in the settlement. This defect in itself warrants rejection of their intervention requests.

⁸ See 47 C.F.R. § 1.223(c).

⁹ As the Commission has previously noted, “that the [petitioner] may not have anticipated the specific outcome based on the settlement agreement before [the Presiding Judge] does not provide grounds for its entry into the proceeding at this late date.” In point of fact, “[i]f [it] were...require[d] for the Commission to accept surprise as a sufficient justification for a new party to seek [intervention and reconsideration of a settlement agreement] the Commission’s-and indeed the public’s-interest in finality of licensing decisions would be eviscerated.” *Las Americas Communications, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2625, 2626 (1992) (denying petition to intervene in part because surprise that a proceeding could result in a settlement agreement alone is an insufficient basis for untimely intervention), *recons. denied*, 8 FCC Rcd 51 (1992).

¹⁰ See, e.g., *JNE Investments, Inc.*, 23 FCC Rcd at 627 (finding intervention motion deficient for lacking affidavit).

¹¹ In their Initial Motion, *Judy et al.* asserted that the settlement would include sale of the above-captioned licensees’ licenses, see Initial Motion at 3 & Exhibit A at 7-8, but the Settlement Agreement never encompassed such provisions.

5. Finally, Judy *et al.*'s requests to intervene are substantively deficient. These individuals assert that they have a strong and direct interest in intervening in this case.¹² The Presiding Judge, however, has already rejected this argument with respect to intervention requests by other similarly situated minority shareholder groups (including at the settlement stage), and properly exercised his discretion in denying their requests to intervene.¹³ Commission precedent supports those decisions, and should be similarly applied here¹⁴ While Judy *et al.* claim that the Settlement Agreement harms their investment, such facts, even if true, would be a private contractual matter between Judy *et al.* and the above-captioned licensees, not appropriately raised here. Accordingly, Judy *et al.*'s attempts to distinguish itself from other prior intervention requests, fail.

6. Finally, Judy *et al.* have not shown that their intervention would assist the Commission or Presiding Judge in deciding the designated issues. Judy *et al.*'s avowed purpose in seeking intervention – to object to the Settlement Agreement – does not advance decision-making on the designated issues.¹⁵ This proceeding relates to PCSI's alleged misconduct before the hearing designation, not to the longstanding corporate disputes referred to by Judy *et al.* here. Accordingly, the results of Judy *et al.*'s private litigation, even if successful, do not invalidate

¹² See Appeal at 2-3; Renewed Motion at 2.

¹³ See *Pendleton C. Waugh, et al.*, EB Docket No. 07-147, Memorandum Opinion and Order, FCC 09M-48 (ALJ Sippel, rel. July 16, 2009) (denying Motion to Intervene filed by an association of minority investors and shareholders during settlement negotiations); *Pendleton C. Waugh, et al.*, Memorandum Opinion and Order, FCC 08M-09, (ALJ, rel. Feb. 19, 2008) (citing authorities) (denying Petition to Intervene filed by a lender).

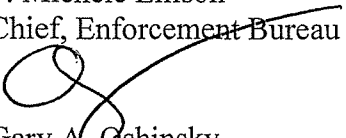
¹⁴ See, e.g., *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, 627 (2008) (considering dismissed motion to intervene on its merits and finding that mere financial interest does not support an intervention).

¹⁵ Neither the Initial Motion nor the Renewed Motion advances a purpose consistent with the requirements of precedent. First, in Judy's Initial Motion, it sought to intervene to stay then-pending settlement negotiations. Next, in its Renewed Motion, it sought to intervene to object to the Settlement Agreement. Neither of these comports with precedent. See *Daniel Meister*, Trustee in Bankruptcy for New Haven Radio Inc., Memorandum Opinion and Order, 102 FCC Rcd 744 (Rev. Bd. 1985), *motion to vacate dismissed*, Order, 1985 WL 260195, *affirmed*, Order, 1986 WL 291654 (1986) (finding that petition to intervene predating and on appeal during approval of settlement agreement was untimely, failed to demonstrate how petitioner would assist Commission in determining the issues in question, and addressed concerns more appropriate for a bankruptcy court to consider).

Settlement Agreement negotiations or execution.¹⁶ The appropriate forum, if any, to resolve Judy *et al.*'s concerns remains private civil litigation.¹⁷ Thus, the Appeal should be rejected.¹⁸

7. Contrary to Judy *et al.*'s claims, therefore, regardless of the outcome of private litigation in Delaware, Judy *et al.*'s intervention requests should be denied. For the reasons described above, Judy *et al.* has not met the requirements of 47 C.F.R. § 1.223(c), and thus, Judy is not entitled to full party status in this proceeding. Thus, the Bureau respectfully requests that the Commission deny or dismiss Judy *et al.*'s Appeal.

Respectfully submitted,
P. Michele Ellison
Chief, Enforcement Bureau



Gary A. Oshinsky
Anjali K. Singh
Attorneys, Investigations and Hearings Division

Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554
(202) 418-1420

October 14, 2009

¹⁶ The Delaware Court's finding in Judy's favor in private litigation does nothing further to substantiate its claims that, at the time of settlement negotiations and approval of the Settlement Agreement, PCSI's current management lacked authority to negotiate settlement on behalf of the above-captioned licensees. The outcome only concerns PCSI's *prospective* internal corporate affairs.

¹⁷ See authorities cited, *supra*, note 15; *Pappamal Kurian*, Letter, 24 FCC Rcd 4842 (Wireless Telecommunications Bur., Mobility Div., 2009) (holding that Commission practice is to accommodate final orders of courts of competent jurisdiction, absent compelling public reasons to do otherwise); *Metromedia Company*, Memorandum Opinion and Order, 3 FCC Rcd 595 (1988) (declining to intervene in parties' private contractual disputes).

¹⁸ See, e.g., authorities cited *supra*, note 9 ((denying petition to intervene in part because the petition merely speculated, rather than enclosing affidavits with personal knowledge, as to applicant's ability to operate and construct timely); *JNE Investments, Inc.*, 23 FCC Rcd at 627 (finding that movant seeking intervention failed to demonstrate how his participation would assist the Commission in determining the issues in question).

CERTIFICATE OF SERVICE

Rebecca Lockhart, a Paralegal Specialist in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 14th day of October 2009, sent by first class United States mail or electronic mail, as noted, copies of the foregoing "Enforcement Bureau's Opposition to Michael D. Judy's Appeal," to:

Charles M. Austin
Preferred Acquisitions, Inc.
Preferred Communication Systems, Inc.
400 East Royal Lane, 9 Suite N-24
Irving, TX 75039
precomsys@aol.com

Jay R. Bishop
1190 South Farrell Drive
Palm Springs, CA 92264
jaybishopps@aol.com
michellebishopps@aol.com

William D. Silva**
Law Offices of William D. Silva
5335 Wisconsin Ave., NW
Suite 400
Washington, DC 20015-2003
bill@luselaw.com
Attorney for Pendleton C. Waugh

Michael D. Judy
5874 Nees Avenue
Clovis, CA 93611

Chief Administrative Law Judge Richard L. Sippel*
Federal Communications Commission
445 12th Street, S.W., Room 1-C768
Washington, DC 20054


Rebecca Lockhart

* Hand-Delivered and Courtesy Copies Sent Via E-Mail and Facsimile

** Service Copies May Be Sent Via E-Mail (E-Mail service acceptable in lieu of hard copies for files 4 MB or less per agreement.)